LIBRARY
SUPREME COURT, U.S.

FILED
MAY 28 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1785

WELLMAN INDUSTRIES, INC.,

Petitioner,

—versus—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, and REED JOHNSTON, Regional Director for the Eleventh Region,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

GERALD J. BARRE
ROBERT M. SALTZSTEIN
STEPHEN F. GORDON
Mirkin, Barre, Saltzstein
& Gordon, P.C.
98 Cutter Mill Road
Great Neck, New York 11021

PETER D. HYMAN
Hyman, Morgan & Brown
120 Courthouse Square
Florence, South Carolina 29501

Attorneys for Petitioner

INDEX

PAGE

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutory Provisions Involved 3

Statement of the Case 11

REASONS FOR GRANTING THE WRIT:

1. The Court of Appeals has decided an important question of federal law in a case of novel impression which requires decision by the Supreme Court of the United States 14

2. The Court erred in refusing to remand with instructions that an *in camera* inspection be held in order to determine if the requested materials fall within Exemption 7 19

3. Failure of the Board to give the petitioner access to documents combined with the refusal to hold a hearing was a denial of "due process of law" 22

CONCLUSION 23

APPENDIX A—Opinion of the Court of Appeals 1a

APPENDIX B—Opinion and Order of the District Court 9a

PAGE

Table of Citations

Cases:

Ackerly v. Ley, 420 F.2d 1336 (D.C. Cir. 1969) 21

Barceloneta Shoe Corporation v. Compton, 271 F. Supp. 591 (D.C. Puerto Rico 1967) 17

Clement Brothers, Inc. v. N.L.R.B., 282 F. Supp. 540 (N.D. Ga. 1968) 17

Cowles Communication, Inc. v. Department of Justice, 325 F. Supp. 726 (N.D. Cal. 1971) 19

Environmental Protection Agency v. Mink, 410 U.S. 93, 93 S. Ct. 839 (1973) 20

Frankel v. Securities and Exchange Commission, 336 F. Supp. 675 (S.D.N.Y. 1971) 21

N.L.R.B. v. Bata Shoe Co., Inc., 377 F.2d 821 (4th Cir. 1967), *cert. denied,* 389 U.S. 917 (1967) 22

Wellford v. Hardin, 444 F.2d 21 (4th Cir. 1971) 17

Constitutional Provision:

United States Constitution
Fifth Amendment 10

Statutes and Rules:

5 U.S.C. §552(a) 3
5 U.S.C. §552(a)(2) 3
5 U.S.C. §552(a)(3) (Freedom of Information Act) ..4, 12
5 U.S.C. §552(a)(4)(b)(7) 5

PAGE

5 U.S.C. §552(a)(4)(c) 5
5 U.S.C. §552(b)(4) 13
5 U.S.C. §552(b)(7) 2, 13, 14, 19
28 U.S.C. §1254(1) 2
29 U.S.C. §159(a) 5
29 U.S.C. §159(b) 6
29 U.S.C. §159(c)(1) 6
29 U.S.C. §159(c)(3) 6
29 U.S.C. §159(e)(1) 6

Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959

Section 9(d) 7, 16
Section 10(c) 7
Section 10(e) 8, 16
Section 10(f) 8

National Labor Relations Board Rules and Regulations, Series 8, as amended:

Section 102.67(b) 8
Section 102.67(c) 9
Section 102.69(c) 9
Section 102.69(d) 10

Other Authorities:

A Preliminary Analysis, 34 U.Ch.L.B. 761, 783 (1967) 21
H.R. Rep. No. 1497, 89th Cong. 2d Sess. 11 (1966) 10
S. Rep. No. 813, 89th Cong. 1st Sess. 9 (1965) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. .....

WELLMAN INDUSTRIES, INC.,

Petitioner,

—versus—

THE NATIONAL LABOR RELATIONS BOARD and EDWARD B. MILLER, JOHN H. FANNING, HOWARD JENKINS, JR., RALPH E. KENNEDY, JOHN A. PENELLO, Members of the Board, and REED JOHNSTON, Regional Director for the Eleventh Region,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, WELLMAN INDUSTRIES, INC. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 22, 1974.

Opinion Below

The opinion of the Court of Appeals, not yet reported, and the opinion rendered by the District Court for the District of South Carolina appear in Appendix A and Appendix B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 22, 1974. A timely petition for rehearing *en banc* was denied February 28, 1974, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether information obtained by the National Labor Relations Board in connection solely with a non-adversary representation proceeding, constitutes investigatory files compiled for law enforcement purposes, within the meaning of 5 U.S.C. 552(b)(7).

2. Whether a determination can be made by a Federal Court that documents are exempt from disclosure under 5 U.S.C. 552(b)(7) without first engaging in an *in camera* inspection of the requested materials.

3. Whether the refusal of the National Labor Relations Board to give Petitioner access to the requested materials combined with a refusal to hold a hearing in the representation proceedings, was a denial to Petitioner of "due process of law".

Statutory Provisions Involved

United States Code, Title 5:

"§552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

. . .

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index pro-

viding identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to the causes the court considers of greater

importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

. . .

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

. . .

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

United States Code, Title 29:

"§159. Representatives and elections—Exclusive representatives; employees' adjustment of grievances directly with employer

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of

the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment . . .

Determination of bargaining unit by Board

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter . . .

Hearings on questions affecting commerce; rules and regulations

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof . . .

(3) . . . In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election . . .

Secret ballot; limitation of elections

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer."

Labor Management Relations Act, 1947, as amended by Public Law 86-257, 1959:

"Representatives and Elections

Sec. 9. . . . (d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Prevention of Unfair Labor Practices

Sec. 10. . . . (e) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further

testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . .

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . ."

National Labor Relations Board Rules and Regulations, Series 8, as amended:

"Sec. 102.67 . . .

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: Provided, however, That within 10 days after service thereof any party may file eight copies of a request for review with the Board in Washington, D. C. . . .

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error . . .

Sec. 102.69 . . .

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall, consistent with the provisions of section 102.69(d), investi-

gate such objections or challenges, or both. . . . If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to subsection (b) of this section, or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election.

(d) The action of the regional director in issuing a report on objections or challenged ballots, or both, following proceedings under sections 102.62(b) or 102.67, or in issuing a decision on objections or challenged ballots, or both, following proceedings under section 102.67, may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which, in the exercise of his reasonable discretion, he determines may more appropriately be resolved after a hearing, he shall issue and cause to be served on the parties a notice of hearing on said issues before a hearing officer. If the regional director issues a report on objectives and challenges, the parties shall have the rights set forth in subsections (c) and (f) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith."

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

"* * * nor shall any person * * * be deprived of life, liberty or property, without due process of law."

Statement of the Case

Petitioner, Wellman Industries, Inc. (hereinafter referred to as "Wellman") is a manufacturer of both wool and polyester fiber products with its plant being located in Johnsonville, South Carolina. The Respondents are the National Labor Relations Board, the members of the National Labor Relations Board, and the Regional Director for the Eleventh Regional Office of the National Labor Relations Board (all hereinafter referred to as "the Board").

Wellman's plant has been the subject of an organizational drive conducted by the Textile Workers Union of America (hereinafter referred to as "Union") since August of 1971.

A representation election was held at Wellman's plant in November of 1971. The Union failed to receive enough votes to cause it to be certified and as a result filed certain objections to the election which caused an investigation to be conducted by the staff of the Regional Director for the Eleventh Region.

The Regional Director decided the issue on the basis of an administrative investigation rather than direct a hearing thereon before a hearing officer.

During the course of this investigation statements were taken from persons unknown to Wellman and other materials were gathered by the staff member from the Regional Director's Office. On February 17, 1972, counsel for Wellman, Peter D. Hyman, requested by telegram of the Regional Director and the Executive Secretary of the Board that these documents, including affidavits, statements and other materials, as well as the formal record of the case, be forwarded to him. This request was made pursuant to

the provisions of the *Freedom of Information Act Section of the Administrative Procedure Act,* 5 U.S.C. §552(a)(3). This request was denied. Although the denial letter from the Regional Director indicated that certain parts of the record had been attached, in fact none of the information requested had been attached or otherwise forwarded to Wellman's attorney.

Thereafter oral request for the same information was again made by counsel for Wellman and this request was acknowledged by a letter from the Regional Director, but the information requested was refused by his office.

Thereafter the results of the November 1971 election were set aside and a new representation election was conducted on the 19th and 20th days of April, 1972. As a result of the balloting in this election the union was certified as the bargaining representative for certain employees employed at Wellman's plant.

To date none of the information requested by Wellman has been furnished by the Board.

The action concerned herein was instituted by the filing of a complaint in the United States District Court, District of South Carolina, Florence Division on January 15, 1973. The complaint requested the Court to enjoin all proceedings before the Respondents concerning the Petitioner until certain information was supplied under the *Freedom of Information Act* and in addition sought an Order to enjoin the Respondents from further withholding all documents requested by the Petitioner under the provisions of the *Freedom of Information Act* until same were furnished. Simultaneously with this filing the Petitioner moved the Court for a Temporary Restraining Order restraining the

Respondents from proceeding further on any matters before it involving the Petitioner. This latter request was granted and a Temporary Restraining Order was issued January 15, 1973, by the Honorable Robert W. Hemphill.

Thereafter on January 24, 1973, the Temporary Restraining Order was extended until the matter could be heard on the merits.

The Respondents on January 31, 1973 filed a Motion to Dismiss the Complaint or in the Alternative for Summary Judgment.

Counsel for Petitioner on February 14, 1973, filed a Motion to Dismiss the Respondents' Motions and also filed a Cross Motion for Partial Summary Judgment.

This matter was heard by His Honor Robert F. Chapman on February 20, 1973. The hearing was directed to the matters raised in the Petitioner's request for injunctive relief and matters raised by the Respondents' Motion to Dismiss the Compaint. At the conclusion of the hearing the Temporary Restraining Order previously issued on January 15, 1973, was extended until further Order of the Court.

On February 22, 1973, an Order was issued by His Honor Robert F. Chapman dismissing the Petitioner's Complaint and dissolving the outstanding Temporary Restraining Order (Appendix B), relying on the Court's equitable power not to issue an injunction without specifically deciding whether Exemptions 4 and 7 of the *Freedom of Information Act* (5 U.S.C. §552(b)(4) and (7)) were applicable or not.

An appeal was taken to the United States Court of Appeals for the Fourth Circuit from that portion of the Order

refusing to require the Respondents to make the materials requested under the *Freedom of Information Act* available to the Petitioner.

Said appeal was argued on November 7, 1973 and decided January 22, 1974 affirming same, though not for the reasons given by the District Judge (Appendix A). The Court held that affidavits obtained by the Board in a non-adversary representation proceeding were exempt from the production requirements under Exemption 7 (5 U.S.C. §552(b)(7)). An Order denying Petitioner's petition for rehearing *en banc* was filed February 28, 1974.

REASONS FOR GRANTING THE WRIT

1.

The Court of Appeals has decided an important question of federal law in a case of novel impression which requires decision by the Supreme Court of the United States.

The Fourth Circuit's opinion in this case reflects important statutory and policy decisions growing out of bona fide efforts to invoke and secure Constitutional protection for the Petitioner in a situation where an election is upset by fiat and the information required to test the truth of the basis therefor and to prepare for review thereof is cloaked in secrecy in contravention of a statute designed and intended to provide for freedom of information.

The Court of Appeals has held in essence that if the Board is implementing a procedure pursuant to §7 of the NLRA (which could be any procedure of any nature) it is

"law enforcement" and that the exemption of subdivision (b)(7) is applicable. The Court so held despite the fact that the representation proceeding is non-adversary and interlocutory. There is no enforcement as a result of a representation proceeding determination under the NLRA per se, nor can it be said that such proceeding will lead to anything other than a certification or non-certification of representatives—certainly not an Unfair Labor Practice charge. There is no necessity that there be a representation proceeding in order to give rise to unfair labor practice charge, i.e., when there is a recognition agreement and thereafter there is a refusal to bargain. Certification and enforcement of unfair labor practice orders are therefore wholly separate and distinct.

Implicit in the opinion of the Court of Appeals is a holding that if the Board engages in procedures of any nature which are connected with or flow from any statutory duty or obligation in connection with the implementation of the NLRA, such engagement, per se, is law enforcement within the meaning of the exemption.

We urge that such an interpretation is much too broad and would virtually render any administrative agency immune to do as it wished in secrecy and thereby avoid and render nugatory the purposes and intent of the FOIA, to make information available for purposes of scrutiny and review.

To understand what law enforcement means under the Freedom of Information Act with respect to the National Labor Relations Act, resort must be made to the latter statute in order to determine therefrom what constitutes subject matter of enforcement.

§10(e) of the National Labor Relations Act deals with the enforcement and relates to both the procedure to compel enforcement and the subject matter of enforcement, which is an unfair labor practice. The forum is a Court of Appeals. No mention is made of representation proceedings. As a corollary, final orders of the Board granting or denying in whole or in part relief are reviewable in the Court of Appeals (§10(f)). No mention is made therein of representation proceedings and in any event representation proceedings do not culminate in an order. Therefore §10(e) and §10(f) of the National Labor Relations Act clearly limit and delineate the scope of enforcement of orders to unfair labor practice cases only.

The only time there is a review of a representation proceeding is under §9(d) of the National Labor Relations Act and only if it later results in an unfair labor practice which is the subject of an order by the Board of which enforcement is sought under §10(e). In such case, by indirection and by virtue of the representation proceedings being part of the record of the proceedings, it is reviewed as part of the unfair labor practice case.

Therefore, the Court of Appeals has by its opinion broadened the scope of law enforcement to include therein something which is without the scope of the National Labor Relations Act insofar as enforcement is concerned and we believe is in error in holding "whether or not resulting in an unfair labor practice charge, the Board's purpose was to protect and vindicate rights set out in Section 7."

We suggest that if the matter does not lead to a final order in an unfair labor practice case of which the Board seeks enforcement, then such information is not as a result

of law enforcement under the National Labor Relations Act and, therefore, is not law enforcement within the meaning of Exemption 7 of the *Freedom of Information Act.*

In a time when there is demand and a need by the public, the Congress, the Courts and others for free access to information compiled by governmental agencies, the present decision represents a move in the opposite direction and affords total protection to all materials gathered by the Board merely upon their untested assertion that the information gathered was investigatory in nature. This is not an area where there has been active litigation on the question presently before the Court and, in fact, the only two decisions that relate to the question raised by Wellman were cases dealing with information requested after an unfair labor practice proceeding had been filed and at a time when both parties were represented by counsel in an adversary proceeding. *Barceloneta Shoe Corporation* v. *Compton,* 271 F. Supp. 591 (D.C. Puerto Rico 1967); *Clement Brothers, Inc.* v. *N.L.R.B.,* 282 F. Supp. 540 (N.D. Ga. 1968).

While it is true that the Board has the duty to protect and vindicate all rights contained in Section 7 of the NLRA, it does not follow that other rights of citizens as set forth in other statutes can be ignored in the process. There has been no showing that the disclosure at this point would be so premature as to weaken the Board's presentation of its strongest case before the appropriate administrative board or court.

The court's extension of Exemption 7 under the present circumstances does considerable harm to previous declaration that the overriding emphasis of the legislative history was to make information more available to the public. *Wellford* v. *Hardin,* 444 F.2d 21 (4th Cir. 1971).

The report of the House of Representatives states:

> "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

H. R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

The Senate Report indicates that:

> "These [investigatory files] are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court."

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

The Court below stated "while the Senate's use of the term 'law violators' might be construed to mean transgressions of the criminal law, it can also easily be accommodated to the House statement without doing damage to the statutory language" and thus gave a broad interpretation to the House Report in rendering its opinion.

Black's Law Dictionary defines:

> "Adjudication. The giving or pronouncing a judgment or decree in a cause; also the judgment given.
>
> "Litigation. A judicial controversy. A contest in a court of justice, for the purpose of enforcing a right."

Clearly these words have reference and application to adversary proceedings only. We do not see room to interpret same as to provide the basis for applying the exemption in non-adversary proceedings.

2.

The Court erred in refusing to remand with instructions that an *in camera* inspection be held in order to determine if the requested materials fall within Exemption 7.

Exemption 7 provides for protection of certain records where they are "investigatory files compiled for law enforcement purposes. . . ." 5 U.S.C. §552(b)(7). The decision clearly states that the affidavits are within this exemption and for that reason are not available to the employer. The records alone in no way reflect the nature of these materials and, although the opinion refers to them as affidavits, there is indication in the record and in the pleadings that, in addition to the affidavits, other statements and materials which had been compiled by the Board were sought by Wellman which might well fall outside of even the broadest definition of "investigatory files".

Other circuits, as well as this Court, have been careful to afford the fullest protection to the parties seeking the information by granting *in camera* inspections of documents so as to assure that the government would not be allowed merely to file affidavits or to assert in open court that a file was investigatory and thereby foreclose any other determination of the fact. *Cowles Communication, Inc.* v. *Department of Justice,* 325 F. Supp. 726 (N.D. Cal. 1971). In *Cowles* the court ordered that the files be delivered to

the district court for an *in camera* inspection so that the court could determine whether or not they were investigatory files compiled for law enforcement purposes and enter an appropriate judgment.

The present case contains little more than an assertion by the Board that the materials are investigatory materials so as to afford them protection under Exemption 7.

Even accepting for the purposes of argument the court's decision in the present case, it would appear that it is at odds with this Court's language contained in *Environmental Protection Agency* v. *Mink,* 410 U.S. 93, 93 S. Ct. 839 (1973), which provided that purely factual material not subject to protection by the applicable exemption cannot be withheld from an inquiring party. This court went further to provide that an *in camera* inspection was not automatic, but that the defendant was to be given the opportunity by means of detailed affidavits or oral testimony to demonstrate which portion of the documents contained no factual matter that would be subject to protection. If the defendants fail to meet this burden, then the court provided that the district court might order an *in camera* inspection. It would appear that in this instance the matter should be remanded and the Board given an opportunity to submit whatever affidavits it deems necessary to show that the information was material compiled for law enforcement purposes. Should the Board fail to meet the burden placed upon it by presentation of affidavits or oral testimony then it would be incumbent upon the district court to proceed with an *in camera* inspection.

The thrust of Wellman's presentation to the Court below was that the case was not in a proper posture for appellate decision and should be remanded to the district court for inter alia, *in camera* inspection of the files in question.

Wellman has been afforded no opportunity to contest the assertion made by the Board that the matter falls within Exemption 7 and there has been no factual determination by virtue of an *in camera* inspection nor by other permitted means of investigation on behalf of the court to determine whether the materials fall under the protection afforded by Exemption 7. This would appear to be a necessary procedure to be followed by the District Court in keeping with the decisions of other circuits. *Frankel* v. *Securities and Exchange Commission,* 336 F. Supp. 675 (S.D.N.Y. 1971); *Ackerly* v. *Ley,* 420 F.2d 1336 (D.C. Cir. 1969).

As has been pointed out by writers in this area, the words of the statute seem specifically to put emphasis upon the statutory language and away from all else including implied meanings, reliance upon legislative history and judicial legislation. A Preliminary Analysis, 34 U. Ch. L.B. 761, 783 (1967). This being the case it would appear that the statutory scheme would not permit bare claims asserted by the Board to be used to immunize files from scrutiny.

There has been no true and factual determination of the validity and extent of the Board's claim in this matter that the documents fall within Exemption 7 and it would appear that the best means for providing a true and accurate determination of whether or not the documents in question were truly compiled for investigatory files is to have this matter remanded to the district court with an order that an *in camera* inspection of the documents be carried out so that those documents entitled to protection might be separated from those not entitled to such protection. This would give Wellman an opportunity, even

assuming it is not entitled to investigatory materials, at least to have the court make a determination as to what other materials might be present that would be available to Wellman and to provide that these materials be delivered to them in accordance with the provisions of the *Freedom of Information Act.*

3.

Failure of the Board to give the petitioner access to documents combined with the refusal to hold a hearing was a denial of "due process of law".

The Regional Director of the Eleventh Region of the Board refused to order a hearing on the objections filed at various stages of the representation proceedings. In addition, the Regional Director refused to allow the Petitioner to see the information gathered by the Board upon which the Regional Director based his decisions *in the absence of a hearing.*

The denial of a hearing when substantial rights and material issues of fact have been raised is a denial of due process of law secured by the Fifth Amendment to the United States Constitution. *N.L.R.B.* v. *Bata Shoe Co., Inc.,* 377 F.2d 821 (4th Cir. 1967), cert. denied, 389 U.S. 917 (1967).

The Reg onal Director in his initial decision states that there were material and substantial issues raised. Furthermore the Petitioner has set forth the particulars of the material and substantial issues in its request for review.

This action by the Regional Director when combined with the Respondents' refusal to produce the documents upon

which the Regional Director, in the absence of a hearing, based his decision, is a total denial of due process of law aside from violating the statutory rights granted to the plaintiff under the FOIA. The Petitioner did not get a hearing in the representation proceeding because the Regional Director so decided and, unless the Petitioner is entitled to see the documents upon which the Regional Director based his decision, the Petitioner is helpless to defend itself against the denial of the hearing and the decision which resulted from facts not obtained through a hearing.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

GERALD J. BARRE
ROBERT M. SALTZSTEIN
STEPHEN F. GORDON
Mirkin, Barre, Saltzstein
& Gordon, P.C.
98 Cutter Mill Road
Great Neck, New York 11021

PETER D. HYMAN
Hyman, Morgan & Brown
120 Courthouse Square
Florence, South Carolina 29501

Attorneys for Petitioner

May 22, 1974